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Supreme Court, U.S.
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No. 98-385

In The

Supreme Court of the United States

October Term, 1998

KENNETH DON EARLES, C.P.A., *et al.*,

Petitioners,

vs.

STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANTS OF LOUISIANA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Through the petition for writ of certiorari, this Court is pressed to review a decision of the Court of Appeals for the Fifth Circuit granting state action immunity[1] to the State Board of Certified Public Accountants of Louisiana and several of its present and former members and officers (collectively the "Board").[2] Petitioners are licensed Louisiana CPAs[3] who challenge the Board's duty and right to enforce its Rules and to seek compliance by petitioners with those Rules. Specifically, petitioners were charged with having violated the Board's Rules on Incompatible Occupations and Commissions[4] by selling securities and offering investment advisory services to its tax and accounting clients. The Board has determined that

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1. In its decision, the Fifth Circuit also granted the Board immunity pursuant to the Eleventh Amendment to the United States Constitution. It appears that petitioners do not seek review of this grant of immunity through their Petition.

2. Mildred M. McGaha, L. Paul Hood, Leon K. Poché, Lawrence W. Stoulig, Jr., Donald L. Moore, W. Theron Roberts, Michael A. Tham, Susan C. Cochran and J. Gordon Reische.

3. Plaintiffs-petitioners are CPAs licensed in Louisiana and, as such, are subject to the rules and regulations of the Board. Unless a person maintains

> "a current certified public accountant certificate" issued by the Board, he or she may not "assume or use the title or description 'certified public accountant'. . . or 'C.P.A.' " or "engage in the practice of public accounting in the State of Louisiana. . . ."

La. Rev. Stat. Ann. § 37:77(A) and (B) (West 1988).

4. *See* Pet. App. at 36a for text of Rules at issue.

petitioners' dual capacity activities create an intolerable conflict between the self-interest of a CPA-broker and the best interest of his client. This conflict irreparably impairs the objectivity of the CPA, an essential requisite to the CPA's practice. Petitioners have responded by filing suit and alleging that the Board is engaged in "price fixing" and has violated their constitutional rights through the enforcement of its Rules. This case is neither about price fixing nor about over-zealous regulation.

The Board, as a legislatively mandated state agency[5], seeks only to fulfill its *duty, responsibility* and *right* to regulate Louisiana CPAs to preserve and protect the public health, safety and welfare. How is the public welfare implicated? Petitioners' application explains the issue fairly well, if unintentionally. For petitioners assert that by combining certain accounting services with their financial investment advice, they offer the public "one stop shopping." While they argue that this bundling of services benefits the consumer by achieving efficiencies in the area of professional financial planning, including tax and investment advice, they admit that the point of their dual dealing is to trade on their accounting clients' trust and on their own intimate knowledge as accountants of their clients' financial

5. The Board was created as an agency of the State of Louisiana for the purpose of licensing public accountants and regulating the profession of public accounting in Louisiana. La. Rev. Stat. Ann. §§ 37:73, 37:75 (West 1988 & Supp. 1998). The Board's members are chosen by the governor and confirmed by the Louisiana Senate. La. Rev. Stat. Ann. § 37:73 (West 1988). Among the powers of the Board is the ability to "[a]dopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in the state of Louisiana." La. Rev. Stat. Ann. § 37:75 B(2) (West 1988). In accordance with its statutory mandate, the Board promulgated rules prohibiting licensed CPAs from engaging in incompatible occupations and from receiving certain commissions for sales or referrals.

situations and risk preferences. They admit that objectivity may reasonably be required of them in their dealings with their clients — as in counseling with them on tax matters or in preparing tax returns — but adamantly refuse to admit that the reasonably required objectivity may be impaired by the prospect of commissions to be earned on securities to be sold — "This limited partnership interest is such a nice fit for someone in your tax status" — or by the need to put the best face on an investment gone bad — "The service won't look twice if we just expense the whole amount." The outcome of this case does not, of course, depend on petitioners' acquiescence in the correctness of the Rules or even on their inherent correctness as a matter of policy. It turns instead on the foreseeability of the Board's using its authority over the profession to promulgate and enforce rules to preserve the objectivity of professional licensees, to protect the public, and to maintain public trust in the profession. That is all that is necessary for state-action immunity.

Each petitioner represents that he "holds himself as a CPA for *the purposes of identifying and promoting his accounting practice*" (emphasis added). Thus, petitioners do not contest that there is a benefit to being a CPA. The fact that the CPA license adds greatly to furthering the trust relationship with his clients cannot be hidden. The importance of petitioners maintaining their CPA licenses is clear. Were the petitioners to lose the license, the reasons would raise questions that might affect the "trust." However, to maintain that license and enjoy the privileges appertaining thereto, one must comply with the rules and regulations governing the profession. Petitioners have a choice. Each could offer non-public accounting services and sell securities for which they could receive commissions. In this scenario, petitioners would not practice as licensed CPAs. Conversely, each petitioner could subject himself to the Board's jurisdiction, hold himself out as a licensed CPA, and earn a

living as a licensed CPA. In this second scenario, each must forego the brokerage of securities. The sovereign, for very good reasons, has determined that they cannot do both.

Absent from petitioners' presentation is the description of the "benefits" derived by H.D. Vest Financial Services, petitioners' employer. That is, to reap profits, H.D. Vest desires to make an immediate and substantial impact in the arena of consumer financial investment services. What better way to achieve this result, than to trade on the credibility of a well-established CPA?

Petitioners and H.D. Vest wish to trade on this trust for their own self-interest.[6] By enlisting CPAs as brokers, H.D. Vest has a "captive consumer market" where the essential trust relationship is established and significant information regarding the individual consumer's financial position is known. By recruiting CPAs as brokers, H.D. Vest enjoys immediate access and credibility. Despite petitioners' sugar-coated representations about the detriment to the consumer, for H.D. Vest, petitioners' employer and benefactor, this case is about money.

The Proceedings Below. Plaintiff Earles, joined subsequently by Leger and Sledge, brought suit against the Board, seeking to block enforcement of the Rules, in the United States District Court for the Eastern District of Louisiana. The Board filed a motion to dismiss the suit, asserting its immunity from suit under the Eleventh Amendment and the state action doctrine first recognized by this Court in *Parker v. Brown*, 317 U.S. 341 (1943). The district court denied the motion, issuing

6. Of H.D. Vest's 5,000 brokers, approximately 40 to 50 percent are CPAs. *See* "Bending to industry forces, States ease commission bans on Certified Public Accountants' Commissions — Wall Street Comes A-Courtin'," *Accountancy Today*, Vol. 10, No. 12 (July 8, 1996).

no written reasons in support, and the Board sought immediate review in the United States Court of Appeals for the Fifth Circuit.

The court of appeals determined it had appellate jurisdiction, by virtue of 28 U.S.C. § 1291 and the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), to consider the appeal from the denial of the motion to dismiss based upon both Eleventh Amendment and state action immunity doctrines. *Earles v. State Board of Certified Public Accountants of Louisiana*, Pet. App. 1a-23a, reported at 139 F.3d 1033 (5th Cir. 1998). The court determined that the Board is entitled to immunity from suit under the Eleventh Amendment. Pet. App. at 11a.

In addition, the court concluded that state action immunity is properly treated as an immunity from suit. Pet. App. at 14a. Further, the court held that the Board had been given a broad grant of authority by the Louisiana Legislature, authority that includes the power to adopt rules that may have anticompetitive effects. The Board, according to the court, demonstrated that it acted pursuant to state policy to displace competition with regulation that was clearly articulated and affirmatively expressed, in conformity with the requirements set forth by this Court in *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 51 (1982). The court concluded that it is the foreseeable result of enacting a statute such as those creating and empowering the Board that the Board may actually promulgate a rule that has anticompetitive effects. Pet. App. at 21a-22a; *see also City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372-73 (1991).

Consequently, the court of appeals reversed the district court's judgment denying the Board's motion to dismiss based on the state action immunity doctrine. It is from that judgment

of the court of appeals that the petitioners have sought this Court's review.

REASONS FOR DENYING THE WRIT

The Board respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Fifth Circuit's judgment and opinion. Review by means of a writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. That discretion should be exercised to grant such a petition only for compelling reasons. *Id.* No compelling reason exists in this case.

I.

THE FIFTH CIRCUIT PROPERLY EXERCISED JURISDICTION UNDER THE *COHEN* COLLATERAL ORDER DOCTRINE TO RESOLVE THE QUESTION WHETHER RESPONDENT WAS ENTITLED TO STATE ACTION IMMUNITY FROM AN ANTITRUST SUIT.

A. No intolerable inter-circuit conflict exists.

Petitioners expend much ink in an attempt to depict the Fifth Circuit's exercise of its appellate jurisdiction in this case as "exacerbating a split among the Circuits" on whether a state or an arm of the state that invokes its immunity from suit under *Parker* is entitled to an immediate appeal from the trial court's adverse ruling on the immunity issue. To the extent that a split among the Circuits exists, it is not of the magnitude that warrants the squandering of this Court's scarce judicial resources to harmonize.

The court of appeals in this case exercised its appellate jurisdiction under *Cohen* to review the district court's denial

of the defendant's motion to dismiss under the state action immunity first recognized by this Court in *Parker*. In doing so, it relied on its prior opinion in *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996) in which it had held that the district court's refusal to grant the defendants' motions for summary judgment vindicating their entitlement to state action immunity was immediately appealable under the collateral order doctrine. *Id.* at 1394.

In *Martin*, the Fifth Circuit recognized that such a ruling meets all of the requisites of an appealable collateral order, *viz.*, that it is effectively unreviewable on appeal after trial, that it conclusively determines the disputed question, and that it resolves an important issue completely separate from the merits of the action. *Id.* (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) and *Cohen*). It concluded that the *Parker* state action immunity shares the essential element of absolute, qualified, and Eleventh Amendment immunities, to wit, an entitlement not to stand trial under certain circumstances. *Martin*, 86 F.3d at 1395.

This Court has made clear that orders denying absolute, qualified, and Eleventh Amendment immunities are among those that fall within the ambit of *Cohen*. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). The Fifth Circuit in *Martin*, and again in the present case, correctly decided that the *Parker* state action immunity shares all of the attributes viewed as significant by this Court in *Nixon*, *Mitchell*, and *Puerto Rico Aqueduct*. The Fifth Circuit's view is correct. Because, like Eleventh Amendment immunity, the *Parker* state action antitrust immunity is an immunity *from suit*, it is lost forever if it is erroneously denied a defendant. As is Eleventh Amendment immunity, therefore, it is properly appealable as a

final decision within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment. *See Martin*, 86 F.3d at 1397.

In reaching this conclusion, the Fifth Circuit is in full accord with similar holdings of the Eleventh Circuit. That court, in *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986), recognized that the purpose of the state action doctrine is to avoid needless waste of public time and money. It found the reasoning of this Court in *Mitchell* to be dispositive and held that the denial of a summary judgment based on the state action immunity asserted by the defendant constitutes an appealable collateral order under *Cohen*. *Hillsborough*, 801 F.2d at 1290.

The Eleventh Circuit reached a similar result in *Askew v. DCH Regional Health Care Authority*, 995 F.2d 1033 (11th Cir.), *cert. denied*, 510 U.S. 1012 (1993). Relying on both *Mitchell* and *Hillsborough*, the court held that the *Parker* doctrine provides an immunity from suit rather than a mere defense to liability. *Id.* at 1036. Also, questions relating to immunity are "conceptually distinct from the merits" of a plaintiff's claim. *Id.* Thus, the district court's denial of a motion to dismiss or for summary judgment was held a final and appealable order under *Cohen*.

More recently, in *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), *cert. denied*, 517 U.S. 1190 (1996), the Eleventh Circuit held simply that "[t]here is collateral order appellate jurisdiction of the appeals of" certain state entities, *Id.* at 611, and that, "[d]enial of state action immunity from antitrust liability by summary judgment is immediately appealable." *Id.* The Fifth Circuit's holdings in *Martin* and in this case are clearly in harmony with those of the Eleventh Circuit.

Petitioners in this case assert that

> [t]he Fifth Circuit's approach is . . . in considerable tension with several other Circuits' practice of hearing interlocutory appeals from denials of state action immunity only after the district court has certified the state action question under 28 U.S.C. § 1292(b).

Pet. at 11. In support, petitioners cite *Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988); *Catalina Cablevision Associates v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984); *LaSalle Nat'l Bank v. DuPage County*, 777 F.2d 377 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); and *Grendel's Den, Inc. v. Goodwin*, 662 F.2d 88 (1st Cir. 1981), *aff'd sub nom., Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

In none of the cited cases, however, was the issue of appealability under the *Cohen* collateral order doctrine addressed by the court or even presented for review. Petitioners appear to argue that because the parties in those cases sought from and were granted by the district court, the appropriate § 1292(b) certification, and because the courts of appeals agreed that the issues presented were significant enough to hear immediately, that there is somehow an implicit acknowledgment that collateral order appeals were not appropriate. Clearly, that argument does not comport with basic principles of logic. The issue of *Cohen* appealability was simply not presented for review. Consequently, these cases present no intolerable or, for that matter, actual, conflict with the Fifth Circuit's holding in either *Martin* or in this case. While this Court appropriately acts to resolve real conflicts between Circuits, it does not sit to alleviate perceived "tensions," whether considerable or not, between the *legal holdings* of one Circuit and the *unexpressed practices* of another.

Unlike the petitioners' allegation of "considerable tension" between the Fifth Circuit's case law and perceived practices of the First, Seventh, and Ninth Circuits, their assertion regarding *Huron Valley Hospital, Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir.), *cert. denied*, 479 U.S. 885 (1986) is that it squarely conflicts with this case. Pet. at 9. To the extent that the cases are not distinguishable on their facts, any conflict presented is not so intolerable as to require this Court's review.

The aggrieved parties in *Huron* sought, in an immediate appeal, the court of appeals' review of the district court's denial of the defendants' motions for summary judgment based upon both qualified immunity and *Parker* state action immunity. Citing *Mitchell v. Forsyth*, the court determined it had jurisdiction to review the qualified immunity claim as an appealable collateral order. 792 F.2d at 567. At the same time, however, the court concluded that it did not have jurisdiction to entertain an immediate appeal on the merits of the denial of the defendants' assertion of state action immunity. *Id.* at 567-68.

Notably, while the Sixth Circuit believed that *Parker* immunity is not an entitlement of the same magnitude as qualified immunity or absolute immunity, it concluded that the analysis necessary to determine whether the immunity claim was completely separate from the merits of the original claim overlapped the analysis necessary to determine whether the defendants violated the rights of the plaintiff in the case before the court. *Huron*, 792 F.2 at 567. In the court's words, "[t]hese conclusions are intimately intertwined with the ultimate determination that anticompetitive conduct has occurred in violation of the protected rights of" the plaintiff. *Id.*

Thus, unlike in the present case, the Sixth Circuit determined that the requirement that the immunity claim must

be completely separate from the merits of the original claim had not been met, *Id*, a determination that renders *Huron* clearly distinguishable from the case before the Court as well as from *Martin* and the Eleventh Circuit cases cited previously. There is, accordingly no inter-circuit conflict to be resolved.

Even if the Court were to deem *Huron* legally indistinguishable from this case, the apparent conflict among the Circuits is not one this Court need resolve because the *Huron* opinion stands isolated. Neither any other Circuit nor any district court has relied on *Huron* for the proposition that denials of state action immunity are not immediately appealable collateral orders.

Perhaps most telling, even the Sixth Circuit has not relied on it again. Indeed, when that court has cited *Huron* it is for the rather unremarkable propositions that: (1) the denial of a motion for summary judgment is not typically a final judgment subject to immediate appeal; and (2) a court of appeals has no obligation to review other issues on appeal simply because the court has entertained an immediate appeal of the denial of qualified immunity.

Thus, while it would be an overstatement to assert that the case has fallen into a type of judicial desuetude, it is not inaccurate to characterize the case as an isolated, twelve year-old expression of the views of one panel of one Circuit, an expression that has not been reaffirmed nor has it been of even the slightest persuasive authority. This orphan simply does not create the intolerable inter-circuit conflict that has historically propelled the Court to harmonize the law.

B. Reversing the Fifth Circuit's judgment will upset settled expectations and will burden sovereign states entitled to be immune from suit.

Petitioners wish to apply the *Parker* doctrine as immunity from liability rather than immunity from suit. In challenging the jurisdiction of the Fifth Circuit to entertain the denial of state action immunity pursuant to the *Cohen* collateral order doctrine, petitioners attempt to differentiate the Eleventh Amendment immunity from suit from state action immunity. The propriety of the immediate appeal of a denial of state action immunity is best evaluated through responding to a single question — Is it reasonable for the state and its agencies to be subject to a costly lawsuit even if it may be immune from such proceedings? This answer is an obvious no.

The sovereign states, and their agencies acting pursuant to clearly articulated state policies, have, since 1943, ordered their affairs in such a way as to pursue legitimate regulatory powers free from being subjected to accusations of antitrust violations, with the attendant time, expense, and chilling effects of protracted litigation. As both the Fifth and the Eleventh Circuits have consistently recognized, the same factors that support *immunity from suit* where absolute, qualified, or Eleventh Amendment immunities are involved, support immunity from suit where a state or its agency engages in policies pursuant to its police power that may foreseeably have anti-competitive effects. That such acts may be prohibited to private actors by virtue of the Sherman, Clayton, or other antitrust acts is irrelevant to a state's intent to protect its citizens from what it calculates to be greater evils. The primary justification of state action immunity is the same as that of Eleventh Amendment immunity, to wit, "to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties" and to "ensur[e] that the States' dignitary

interests can be fully vindicated." *Puerto Rico Aqueduct*, 506 U.S. at 146.

Because of the settled expectations of the states and their agencies, and because of the potential harm they will suffer as a result of an incorrect denial of immunity, their immunity under the state action doctrine must be resolved at the earliest possible time. Once a state has been subjected to the travails of discovery and trial, the proverbial bell cannot be un-rung. Thus, denials of immunity properly fall within the ambit of *Cohen:* they are effectively unreviewable on appeal after trial; they conclusively determine the disputed question; and they resolve an important issue completely separate from the merits of the action. *See Coopers & Lybrand*, 437 U.S. at 468. The Fifth Circuit's ruling on the jurisdictional issue was clearly correct and serves to promote, rather than retard, these interests.

The Fifth Circuit's decision on the applicability of the state action immunity doctrine was, similarly, correct. The courts of appeals have proceeded from the basic assumption that the Sherman Act never had, as an underlying purpose, the restraint of state action. Rather, the Sherman Act declared that it prevented only the acts of "business combinations." 21 Cong. Rec. 2562, 2457, 2459, 2461. The Act must be taken to be a prohibition of individual and not state action. *See Parker*, 317 U.S. at 352.

The Board recognizes and heartily agrees with the proposition, quoted by petitioners, at Pet. 16, that "[t]he preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992). Protecting the public from the obvious conflicts of interest presented by CPAs who steer their clients to investments sold by the CPA, who will also realize a commission for the sale,

has none of the earmarks of the practices the Sherman Act was calculated to prevent.

Accordingly, in addition to the fact that no intolerable inter-circuit conflict is presented by this case, the Fifth Circuit's opinion is in complete accord with the dictates of this Court. The settled expectations of the states and the agencies they create should not be disturbed.

II.

PETITIONERS' ANTITRUST ANALYSIS IS FLAWED AND A REVERSAL OF THE FIFTH CIRCUIT'S DECISION WOULD SERVE ONLY TO UPSET WELL-SETTLED MATTERS RELATING TO THE APPLICABILITY OF STATE ACTION IMMUNITY TO THE ARMS OF THE STATE.

Through a calculated and misleading sophistry, petitioners attack the Fifth Circuit's decision that the Board enjoys immunity from antitrust suit under the *Parker* doctrine. Petitioners first challenge the Fifth Circuit's opinion that the Board, when enforcing its Rules, acts through a clearly articulated and affirmatively expressed state policy. Surprisingly, petitioners begin by mischaracterizing the Board's enforcement of its Rules as "price-fixing"[7] and by misclassifying the individual Board members as private actors engaged in anticompetitive activity for their own self-interest.[8] Pet. at 16-19. Petitioners then argue erroneously that "[t]he Fifth

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7. Petitioners' characterization is surprising in light of the fact that they failed to allege "price-fixing" in either their original complaint or in their amended complaint.

8. Petitioners failed to allege "price-fixing" in either their original complaint or in their amended complaint, each exceeding 20 pages.

Circuit's decision in this case can be upheld only if *Goldfarb* is no longer good law." Pet. at 19-21. Finally, petitioners conclude their suspect plea by misleadingly asserting that the Fifth Circuit's decision on both the clear articulation and active supervision prongs of the *Midcal*[9] test conflicts with the approach taken by other circuits and is contrary to existing law. Pet. at 22-30.

As demonstrated below, the prior decisions of this Court and those of the courts of appeals make clear that petitioners' allegations and contrived arguments are not pertinent to the analysis and that the alleged "conflict between the circuits" does not exist. In essence, petitioners pray that this Court revisit matters well settled and embrace the already rejected notion that state legislatures must ". . . catalog all anticipated effects of a statute . . ." and ". . . expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43 (1985) (rejecting this argument on grounds that it demonstrated an "unrealistic view of how legislatures work and how statutes are written.") Consequently, petitioners' Petition for Writ of Certiorari should be denied.

A. Petitioners' allegation of price fixing is meritless and is not germane to the state action immunity determination.

Petitioners' characterization of the Board's enforcement activities as "self-interested, anticompetitive" price-fixing is the proverbial red herring. It is of no moment that the Board is composed of CPAs and that its members may, therefore, be "interested" in rules and enforcement proceedings at issue. Louisiana's expression of sovereign will that the Board be so constituted cannot be clearer.[10] Besides, there is no market

9. *California Liquor Dealers Association v. Midcal Aluminium, Inc.*, 445 U.S. 97 (1980).

10. La. Rev. Stat. §37:73 provides in pertinent part: (Cont'd)

participant exception to the doctrine of state action immunity. *See Paragould Cablevision, Inc. v. City of Paragould, Ark.*, 930 F.2d 1310 (8th Cir.), *cert. denied*, 502 U.S. 963 (1991); *accord, Greenwood Utilities Comm'n v. Mississippi Power Co.*, 751 F.2d 1484 (5th Cir. 1985). Moreover, and perhaps most importantly, this Court has noted previously that even though a market actor may be in competition with the individual subject of disciplinary action, such activity is considered to be a fulfillment of the obligations and duties of that particular position and not anticompetitive activity. *See Bates v. State Bar of Arizona*, 443 U.S. 350 (1977).

Petitioners' allegation of price fixing is an exercise in misdirection. This case is not about price fixing. From the outset and throughout their application, petitioners mischaracterize the Board's enforcement of the Incompatible Occupation Rules and the Rule on Commissions as part of a scheme to fix prices. Through an extraordinary leap of logic, petitioners argue that these two Rules "restrict competitive pricing" and, therefore, are "tantamount to price-fixing." But neither the original nor amended complaint (both of which contain in excess of 20 pages of allegations) alleges illegal price-fixing. It bears worth repeating, this case is about the Board, as a legislatively mandated state agency, and *its duty, responsibility and right* to regulate Louisiana's CPAs and to

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(Cont'd)

§ 73. State Board of Certified Public Accountants of Louisiana; appointment; domicile

A. The State Board of Certified Public Accountants of Louisiana is hereby created as a state agency within the Department of Economic Development and shall consist of seven persons appointed by the governor each of whom shall be a certified public accountant as defined in this Chapter and a resident of the state of Louisiana.

preserve and protect the public health, safety and welfare. For petitioners, they carry the banner of their employer, H.D. Vest, which seeks substantial monetary profits derived by the CPA-brokers who trade on the trust created through the accounting relationship. Given H.D. Vest's financial motivation, the allegation of "price-fixing" is exposed for what it is — an inflammatory, misleading characterization pitched to create an allure that may pique the interest of the courts in an otherwise mundane enforcement action.

B. Price fixing cases, like *Goldfarb*, do not apply.

In further advancement of their strained reasoning, petitioners claim that "the Fifth Circuit's decision in this case can be upheld only if *Goldfarb* is no longer good law." Pet. at 21. In this case, there is no question of the State of Louisiana or its agency, the Board, being a participant in a private agreement or combination by others for the restraint of trade. Similarly, there is no suggestion that the Board, in promulgating its rules, has acted to set minimum fees. Thus, the Fifth Circuit did not "ignore" *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), as the petitioners suggest. Pet. at 15. Rather, the court properly recognized that *Goldfarb* is factually distinguishable from the present case.

Additionally, the Board maintains that *Goldfarb* is distinguishable and that *Bates v. State Bar of Arizona*. 433 U.S. 350 (1977) controls. In *Goldfarb*, the enforcement of a professional regulation (a proposed minimal fee schedule for attorney services) impacted directly the price paid by consumers for legal services. This Court held that the attorney minimum fee schedule prescribed by a county bar association violated the Sherman Act because the proposed schedule was neither "required" nor "compelled" by state statute or state common

law and because the preparation of the actual schedule of fees was left to the discretion of the county bar. [11]

Goldfarb obviously does not control. First, the Rule on Incompatible Occupations and the Rule on Commissions are not the equivalent of a minimum fee schedule. The Board's enforcement of these rules does not result in a "fixed, rigid price floor" as was the case in *Goldfarb*. It strains credulity to suggest that price competition has been eliminated in the market for accounting services because of the Board's enforcement of these regulations. Second, the Court took special note that the fee schedule in question was left to the discretion of the county bar association (not a state agency) and was not compelled by either the Supreme Court of Appeals (the actual entity with the legislative mandate) or the Virginia State Bar Association (an authorized state agency). *Goldfarb*, 421 U.S. at 790-92.

This Court's decision two years later in *Bates* makes the distinction explicitly. In *Bates*, the Court applied the standard

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11. This Court reviewed the grant of authority by the Virginia legislature to the Virginia Supreme Court of Appeals. The pertinent provision provided in part that:

> The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of the state, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing.

See Goldfarb, 421 U.S. at 775, n.2 (quoting Virginia Code Ann. § 54-49 (1972)).

set out in *Goldfarb* to Arizona State Bar regulations that restricted the advertising practices of lawyers. The Court held that a restraint upon attorney advertising imposed by the Supreme Court of Arizona, wielding the power of the state over the practice of law, was *not* subject to attack under the Sherman Act. The Court began its analysis by recalling and limiting *Goldfarb*, commenting that

> [i]n holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intended no diminution of the authority of the State to regulate its professions. [*Goldfarb*,] 421 U.S. at 793. Allowing the instant Sherman Act challenge to the disciplinary rule would have precisely that undesired effect.

Bates, 433 U.S. at 359 n.11. Concluding its analysis, the Court wrote:

> [I]t cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent [in *Goldfarb*]. . . . In the instant case [*Bates*], by contrast, the challenged restraint is the affirmative command of the Arizona Supreme Court . . . the ultimate body wielding the State's power over the practice of law, . . . and thus, the restraint is "compelled by direction of the State acting as sovereign."

Bates, 433 U.S. at 360 (citations omitted).

As is the Board here, the Supreme Court of Arizona and the State Bar of Arizona were, in *Bates*, creatures of state

law.[12] The Supreme Court of Arizona, as "ultimate body wielding the State's power over the practice of law," could and did promulgate the rules for the regulation of the legal profession, and such rules were considered compelled by the state as sovereign, despite the absence of any state constitutional or statutory compulsion that attorney advertising, specifically, be controlled.

While the grant of authority to the Board by the Louisiana Legislature does not specifically direct the Board to promulgate a rule of professional conduct that prohibits the brokerage of securities by CPAs, the Board has been charged with the responsibility of regulating and administering the profession. In meeting its responsibility, it promulgated the Incompatible Occupations Rule and the Rule on Commissions and enforced these Rules against petitioners for their non-compliance. *Bates*, not *Goldfarb*, controls, and the Board enjoys state-action immunity.

Bates teaches that "the regulation of the activities of [its professions] is at the core of the State's power to protect the

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12. Rule 27(a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. pp. 84-85 (1973) provides in pertinent part:

> 1. In order to advance the administration of justice according to law, . . . the Supreme Court of Arizona does hereby perpetuate, create and continue under the direction and control of this Court an organization known as the State Bar of Arizona, and all persons now or hereafter licensed in the state to engage in the practice of law shall be members of the State Bar of Arizona in accordance with the rules of this Court. . . .
>
> * * *
>
> 3. No person shall practice law in this State or hold themselves as one who may practice law in this State unless he is an active member of the state bar.

public." *Bates*, 433 U.S. at 361; *see also Goldfarb*, 421 U.S. at 792. It is from a state's "compelling interest" in regulating professions practiced within its boundaries that its state-action immunity derives. If petitioners' arguments were to prevail, Louisiana's sovereignty would be severely compromised and the balance between federal and state sovereignty acknowledged in *Parker* would be upset.

C. Petitioners' perception of tension between the circuits is inaccurate, and the Fifth Circuit has followed correctly the teachings of this Court.

Petitioners perceive that the Fifth Circuit's decision in this matter conflicts with the First Circuit's decision in *FTC v. Monahan*, 832 F.2d 688 (1st Cir. 1987). Pet. at 21-22. Petitioners only obfuscate the issue by dropping Judge Breyer's decision in *Monahan* into the discussion. In *Monahan*, the First Circuit evaluated the propriety of subpoenas issued by the Federal Trade Commission to the Massachusetts Board of Registration in Pharmacy. The Board of Pharmacy objected to the subpoenas and argued that it was immune from compliance on state-action grounds. Citing Judge Breyer's decision in *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. 1987) ("Massport"),[13] the Board of Pharmacy argued that the court of appeals could look only to the antitrust complaint to determine the propriety of its claim for immunity. Distinguishing *Massport*, Judge Breyer wrote that "[b]ecause *Massport* was not a subpoena enforcement case, we could look at the complaint and directly compare the claimed activities with Massport's authorizing legislation." *Monahan*, 832 F.2d

13. In *Massport*, a charter airline operator brought an action against the Massachusetts Port Authority alleging the Authority's refusal to allow it to use a particular terminal airport violated federal antitrust laws and certain federal aviation statutes; the district court dismissed the case pursuant to Fed. R. Civ. P. 12(b)(6). *See Interface Group, Inc. v. Massachusetts Port Authority*, 631 F. Supp. 483, 496-97 (D. Mass. 1986).

at 690. Thus, in Judge Breyer's own words, *Monahan* was different because it was a "subpoena enforcement case." Consequently, petitioners' reliance upon *Monahan* is misplaced.

Petitioners next attempt to challenge the Fifth Circuit's decision to follow this Court's dictated standard that "accord[s] appropriate deference to state sovereignty" and the Fifth Circuit's holding that "[a]s long as the state clearly articulates its intent to adopt a permissive policy, the first prong of the *Midcal* test is satisfied. *Southern Motor Carriers*, 471 U.S. at 60." Pet. App. 20a-21a. The reasoning of the Fifth Circuit is clear. And, petitioners' dissatisfaction with the holding is more a product of having encountered an adverse decision rather than mounting a serious attack upon the Fifth Circuit's application of existing law. Essentially, petitioners are blind to the decisions of the Fifth and its sister circuits that have followed this Court's holdings in *Town of Hallie* and *Omni* by evaluating state agencies in the same manner as municipalities. *See Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996) (*held* defendant agency composed of both a municipality and a state subdivision hospital district entitled to state action immunity although the legislative grant of authority not specific); *see also First American Title Company v. South Dakota Land Title Association*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984); *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989); *Crosby v. Hospital Authority*, 93 F.3d 1515 (11th Cir. 1996). Even though the grant of legislative authority did not specifically address the actions that were the subject of the lawsuits, the courts in *Martin, First American, Hass and Crosby* granted state action immunity to the defendant state agencies.

In applying *Town of Hallie* in these proceedings, the Fifth Circuit ruled that it could not "deny the state-exemption based merely upon the failure of the Louisiana legislature to expressly state an intention to displace competition . . ." and further wrote that

> [a]s the Supreme Court has noted in an analogous context, such an approach would take an "unrealistic view of how legislatures work and of how statutes are written. *Town of Hallie*, 471 U.S. at 43; (other citations omitted).

Pet. App. 21a. The Fifth Circuit opined:

> Objectively, the Louisiana legislature "intended" that the Board, through its members, exercise any power which the legislature authorized. Here, the Board was authorized to "[a]dopt and enforce all rules and regulations, by-laws and rules of professional conduct as the Board may deem necessary and proper to regulate the practice of public accounting in the State of Louisiana." LA. REV. STAT. ANN. § 37:75(B)(2) (West 1988). This is a broad grant of authority which includes the power to adopt rules that may have anticompetitive effects. It is thus the "foreseeable result" of enacting such a statute that the Board may actually promulgate a rule that has anticompetitive effects.

Id.

Finally, in correctly applying this Court's holding in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), the court of appeals concluded:

> Our analysis is faithful to the principles of federalism that gird the state-action doctrine. As the Supreme Court has noted:
>
> > If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult

> to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.

Southern Motor Carriers, 471 U.S. at 64. We thus conclude that the "clear articulation" requirement is satisfied by the Louisiana statutes which bless the Board with broad rulemaking authority over the profession of public accounting within the state.

Pet. App. at 22a.

In their attack of the Fifth Circuit's decision relating to the active supervision prong of the *Midcal* test, petitioners characterize the determination as a "categorical judgment" based upon "nothing more than 'the public nature of the Board's actions' to dismiss danger of willful anticompetitive action." Pet. at 28. Petitioners' argument is an oversimplification and ignores the Fifth Circuit's careful articulation and rejection of petitioners' inappropriately narrow construction. In this matter, the Fifth Circuit rejected correctly petitioners' argument and opined:

> Despite the fact that the Board is composed entirely of CPAs who compete in the profession they regulate, the public nature of the Board's actions means that there is little danger of a cozy arrangement to restrict competition. So long as the Board is acting within its authority and pursuant to a clearly established state policy, there is no need

> for active supervision of the properly delegated authority.

Pet. App. at 16a-17a. The Fifth Circuit further noted:

> This conclusion comports with our prior precedents and that of other courts of appeals. (Citations omitted). Moreover, this development was expressly anticipated by the Supreme Court's *Town of Hallie* decision. *See Town of Hallie,* 471 U.S. at 46 n.10 ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.").

Pet App. 17a.

The Fifth Circuit's careful reasoning and thoughtful analysis does not "conflict with the approach taken by other circuits' as alleged by petitioners. To the contrary, the decision is consistent with the teachings of this Court and in line with the decisions of other circuits that have addressed the issue. Consequently, the Fifth Circuit's decision should not be disturbed.

CONCLUSION

For the foregoing reasons, Respondents, the State Board of Certified Public Accountants of Louisiana and its members, respectfully urge this Honorable Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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